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No. _____

In The

Supreme Court of the United States

October Term, 1998

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS

On Petition for a Writ of Certiorari
To the Supreme Court of the
State of New Jersey

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

This Petition concerns an election contest case. This Petition for Certiorari arises from the denial of a petition for certification by the New Jersey Supreme Court after the New Jersey Appellate Court affirmed a decision of the trial court which dismissed the Petitioner-Plaintiff's complaint for insufficient proof. Petitioner submits that she was denied a fair hearing and the court's rulings ignore the constitutional principal of "one person, one vote." The Petitioner lost the election by six votes. The following questions presented are questions of first impression:

1. Whether the mere existence of unrecorded legal votes in a number exceeding the margin of an election victory is enough to set aside the election results, and if so, is the failure of a Board of Elections to nullify the election a denial of the constitutional principal of "one person, one vote?"

2. Whether allowing a voter to enter the voting booth twice for the purpose of voting is sufficient to declare the second vote illegal and if so is *N.J.S.A.* 19:52-3 as applied repugnant to the constitutional principal of "one person, one vote?"

3. Whether a plaintiff is denied due process and a fair trial by a trial court which admits hearsay as proof of residency for the purpose of voting?

4. Whether a plaintiff is denied due process and a fair trial by a trial court's liberal construction of "residency" that runs contra to the prevailing rules of evidence?

5. Whether the trial court's failure allow a qualified hand-writing expert to testify that six voter's signatures on voting documents were not genuine denied the Petitioner due process and a fair trial?

6. Whether the trial court's aggregate rulings constituted judicial abuse of discretion, thereby denying the Petitioner due process and a fair trial?

LIST OF PARTIES

This is an election contest case. Petitioner-Plaintiff and parties listed below were parties in all proceedings below and are as follows:

Petitioner, Diane Sank, Republican candidate for office of council in Englewood Cliffs, County of Bergen, State of New Jersey

Respondent, Bergen County Superintendent of Elections

Respondent, Bergen County Board of Elections, and

Respondent, Ilan Plawker, Democratic candidate for office of council in Englewood Cliffs, County of Bergen, State of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment below and order of the New Jersey Supreme Court.

OPINIONS AND ORDERS BELOW

This Petition for Certiorari arises from the denial of a petition for certification by the New Jersey Supreme Court after the New Jersey Appellate Court affirmed a decision of the trial court which dismissed the Petitioner-Plaintiff's complaint for insufficient proof. A trial without a jury was held. On January 12, 1996, the trial court issued an oral decision. (Appendix 11a to 14a). On January 18, 1996, a Consent Judgment in favor of the Defendants was filed by the trial judge. (Appendix 8a to 9a). Plaintiff-Petitioner refused to sign the Consent Order. On February 22, 1996, Petitioner filed a timely Notice of Appeal to the Appellate Division of the New Jersey Superior Court. On December 7, 1998, the Appellate Division issued an opinion affirming the trial court's decision. (Appendix 2a to 7a). Petitioner filed a timely Notice of Petition for Certification to the New Jersey Supreme Court. The Petition for Certification was denied without opinion on February 23, 1999, and filed on February 24, 1999. (Appendix 1a). A timely Petition for Certiorari to this Court follows.

STATEMENT OF JURISDICTION

The jurisdiction of this court rests and is invoked under 28 U.S.C. §1257(a). This Petition for Certiorari arises from a denial of certification by the New Jersey Supreme Court, the highest court of the state. This Petition presents claims wherein the Petitioner was denied rights and privileges guaranteed by the Constitution of the United States, and in addition, was injured by state statutes that were constitutional on their face but unconstitutional as applied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution states:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. New Jersey State Statutes:

> ***N.J.S.A.* 19:29-1(e). Grounds stated**
> The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by the voters of this State or of any of its political subdivisions affected thereby upon 1 or more of the following grounds:
>
> e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result.

***N.J.S.A.* 19:52-3.**
No voter after having entered and emerged from the voting booth shall be permitted to re-enter the same on any pretext whatsoever.

***N.J.S.A.* 19:29-7. Witnesses required to testify**
The judge may require any person called as a witness who voted at such election to answer touching his qualification as a voter, and if the court, from his examination, or otherwise, is satisfied that he was not a qualified voter in the election district where he voted, he may compel him to disclose for whom he voted.

STATEMENT OF THE CASE

This is an election case. It presents questions of general public importance that have not, but should be, settled by this court. The same questions arise in one form or another every year, in election after election across these United States to the continual injuries of candidates for public office who lose elections due to election irregularities and to the injury of qualified voters who have their legal votes rejected or diluted by illegal votes. Year after year these voting irregularities are allowed to proliferate and the questions surrounding constitutionally fair elections have evaded this Court's review. Until the questions presented by this petition are resolved, nationwide voter apathy will be encouraged and qualified candidates will be discouraged from seeking office.

The facts surrounding the questions presented by this Petition are defined by the trial transcript, the appellate opinion, and the New Jersey Supreme Court's denial of certification without opinion.

This Petition concerns a general election contest in which the Petitioner was vying for one of two seats on the

Englewood Cliffs council. The Republican Petitioner, a seasoned veteran of many political campaigns (having served ten years on the Englewood Cliffs council), finished the race eight votes behind Defendant Ilan Plawker in the November 7, 1995 General Election according to the official canvas. Her Democratic opponent was a newcomer to partisan politics.

Immediately following the election, Petitioner brought an election contest action to have the results of the election voided and a new election held, based on the obvious irregularities surrounding the election and the number of illegal votes cast. By a preponderance of the evidence, the Petitioner-Plaintiff identified votes of a sufficient number to determine that it was an impossibility for the Board of Elections (that certified the election results) or the trial judge, to determine which candidate had, in fact, won the election.

1) The Trial

Prior to the commencement of trial, Petitioner had submitted to the trial judge a challenge list of 30 voters and early in the trial, the judge held that certain votes were illegal because the voters were not residents of Englewood Cliffs. His ruling served to reduce the margin of the winning candidate's victory to a mere six (6) votes. The remainder of the trial was devoted to establishing whether the Petitioner-Plaintiff could prove by a preponderance of the evidence, that an additional six (or more) votes had been cast illegally.

What followed then, was a rapid series of rulings which were adverse to the Petitioner.

The Petitioner called upon Eileen C. Feldner, the Bergen County Superintendent of Elections, to testify as to the official results of the election and to question her about the eight votes which were cast but were not tabulated by the voting

machine.[1] She testified that 1,964 voting authorities were issued but only 1,956 votes were tabulated. (5T 11-13 to 12-9). The trial judge refused to nullify the election results on the basis of eight rejected votes, ruling instead the plaintiff had the burden to demonstrate that there were enough illegal votes cast during the election that could have changed the result. (8T 39-18 to 19). He completely ignored *N.J.S.A.* 19:29-1(e) which provides that the burden was equally satisfied by a demonstration that eight "legal" votes were "rejected," a number clearly sufficient to show that it was impossible to know which candidate had, in fact, won the election!

Ignoring *N.J.S.A.* 19:52-3, which clearly states that "No voter after having entered and emerged from the voting booth shall be permitted to re-enter the same on any pretext whatsoever," the trial judge refused to invalidate the *second* vote of Mrs. Messinger, a Democratic Party challenger, who entered the voting machine twice to vote. When asked about this, Messinger testified:

> Q. And did you go back into the booth?
> A. Yes, I did.
> Q. And did you vote?
> A. Yes, I did. [7T 69-24 to 70-2].

The trial judge refused to follow the New Jersey's rules of evidence and refused to invalidate votes cast by a significant number of non-resident voters. (see Point III).

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[1] The eight vote discrepancy was discovered by counting the number of voting authorities issued to voters to enable them to enter the voting machines and cast their ballots and the number of votes tabulated by the voting machines' counter mechanism. Poll workers attend each machine and collect the authorities before allowing a voter to enter the machine and an electronic tone sounds when the vote is tabulated so that the attendant is alerted and can question a voter who exits the booth without recording his vote.

And as a final insult to the Petitioner-Plaintiff's case, the trial judge refused to allow her pre-qualified handwriting expert to testify as to the ungenuine signatures of *six* voters. Making an "error" in tallying up the number of signatures challenged, the judge ruled that *five* signatures were insufficient to change the results of the election. This egregious error was committed even after being advised twice by the Petitioner's attorney that *six* signatures were challenged! (see Point III).

2) The Appeal

The appellate court's opinion affirmed the trial court's oral decision "substantially for the reasons stated by Judge Troast (the trial judge) on the record." (7a). The appellate court found that Judge Troast's "finding of facts and conclusions of the law [were] amply supported by the credible evidence." (7a). Furthermore, issues raised by the Petitioner were without merit and required no further discussion as per *R*. 2:11-3(e)(1)(A) and (E).[2] (7a).

In order to reach their decision, the appellate court took the pains to actually reword the Petitioner's points on appeal that were contained in the *Appellant* Brief, thereby emasculating the legal relevance of crucial issues so that they

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[2] The 1997 Current *Rules of Court for the State of New Jersey*, *Rule* 2:11-3(e)(1)(A) and (E) states "(e) Affirmance without Opinion. (1) Civil Appeals. When in a civil appeal the Appellate Division determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (A) that a judgment of a trial court is based on findings of fact which are adequately supported by evidence; (E) that all issues of law raised are clearly without merit and the court determines that an opinion would have no precedential value; then and in any such case the judgment or order under appeal may be affirmed without opinion and by an order quoting the applicable paragraph of this rule.

appeared to an outside observer to be without merit — thereby eliminating the need for appellate review. For example, the Appellate court reworded Point XI so that it read, "WHETHER THE COURT ERRED BY LETTING STAND MESSENGER'S VOTE, DESPITE HER TWO VOTING *ATTEMPTS*?" (7A). (emphasis added). The Petitioner's point stated in its original form read "THE COURT ERRED IN ALLOWING THE VOTE OF PATRICIA MESSINGER TO STAND DESPITE CLEAR VIOLATION OF *N.J.S.A.* 19:52-3."

By ignoring the evidence presented at trial and refusing to review the transcript, the appellate court's decision ignored questions of great importance to the general voting public.

3) The Petition for Certification

The New Jersey Supreme Court refused to grant the Petitioner's request for Certification which was predicated upon issues of great public importance to its residents, issues of state and federal constitutional import, and the fact that the opinion of the appellate court contradicted a sister appellate court in *In the Matter of Candidates to New Jersey General Assembly*, Unpub. Op., Dkt. No. A-4832-97T3, dec. Sept. 2, 1998, (Appendix 15a to 24a), which stated in no equivocal terms:

> This appeal centers on the meaning of *N.J.S.A.* 19:29-1(e) which provides that voters may contest a nomination or election 'when illegal votes have been received, or legal votes rejected at the polls sufficient to change the result.' At issue is whether the mere existence of unrecorded legal votes in a number exceeding the margin of victory is enough to set aside the election results. We think it is. [15a].

REASONS FOR GRANTING THE PETITION

POINT I THE CONSTITUTIONAL VALIDITY OF *N.J.S.A.* 19:29-1(E) IS AN ISSUE OF GREAT PUBLIC IMPORTANCE BECAUSE AS THE STATUTE IS APPLIED, IT IS REPUGNANT TO CONSTITUTIONAL PRINCIPAL OF "ONE PERSON, ONE VOTE."

Title 19 of the New Jersey statutes represents the attempt of New Jersey's legislature to protect voters rights and insure a procedurally fair election process. When enacted, "deterrence of fraud" — and the "maintenance of the integrity of the elective process" was a primary legislative concern. *In re Battle*, 190 *N.J. Super.* 232, 236-237 (App. Div. 1983).

N.J.S.A. 19:29-1(e) states:

> The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by the voters of this State or of any of its political subdivisions affected thereby upon one or more of the following grounds:
>
> e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result;

The Petitioner submits to this Court, that at trial the preponderance of evidence presented, substantiated her claim that eight legal votes were not tabulated or recorded -- which was a sufficient number to set aside the election results, and that the trial court could not, with reasonable certainty, determine who received a majority of the legal votes. Evidence of the missing eight votes was attested to by the Bergen County Superintendent of Elections, who also said this was not an unusual situation and attributed it to "voter confusion."

The instant facts in evidence are clear-cut: Eileen Feldner, Superintendent of Elections, certified that 1,964 voting authorities were issued by the poll workers during the Englewood Cliffs General Election and that the counters on the voting machines registered only 1,956 votes -- a shortfall of eight votes. (5T 11-13 to 12-9). These eight votes, by definition, were "open ballots" because they presented an impossibility for a court to determine for whom the eight votes were cast. *In Re General Election of Maplewood*, 255 *N.J. Super.* 690, 744 (Law Div. 1992). Pursuant to *N.J.S.A.* 19:29-1(e), eight votes was more than a sufficient number to overturn the elections results.

In the instant case, the trial judge and the appellate court erroneously confused the true issue presented by the fact that eight votes were not tabulated. These courts "characterized" the failure of the election officials and/or the voting machines to correctly tabulate eight votes as an non-issue, caused by "fled" or "confused" voters. The Appellate Court affirmed the trial court's decision "to refuse to set aside the election on the ground of voter confusion" on the trial court's finding that "an eight-vote discrepancy between the number of authorities to vote and the number of votes reported on the machines, the level of error was not unusual and did not indicate an unfair result. (3a).

The facts of the *Maplewood* trial are very similar to the instant facts. In both cases, following a recount, the Petitioners filed verified complaints pursuant to *N.J.S.A.* 19:29-1, et seq. Both Petitioners claimed, *inter alia*, that due to voting irregularities, legal votes were not counted and illegal votes were counted. In reasoning their decision to overturn the election, the *Maplewood* Court emphasized

> The right to vote in a democracy is among the most precious of all individuals' rights. It is a mechanism which individuals can and do use to hold governments accountable, even when other parts of the political process fail to produce accountability. For one's vote, when cast, to be translated into a true message to government and candidates, that vote must be accurately counted, and, if necessary, recounted at every stage of the election process.***The moment an individual's vote becomes subject to an error in the vote tabulation process, the easier it is for one's vote to be diluted. *Maplewood, supra* at 696.

The Petitioner submits that the trite characterization of the disenfranchisement of eight voters, cloaks the judicial denial of a Constitutional right that is at issue. Simply stated, the right to vote is a federally protected right and cannot be taken from a voter through dilution or a failure to count a vote. See *Griffin v. Burns*, 570 *F.2d* 1065 (1st Cir. 1978) (the right to vote is a federally protected right); and *U.S. v. Mosley*, 383 *U.S.* 904 (1915) (the right to vote includes the right to have that vote counted at its full worth).

When affirming the trial court's decision, the appellate court noted that the trial judge rested his decision upon the testimony of Eileen Feldner, the Bergen County Superintendent of Elections, who "testified that it was not unusual, with any machine, for a voter to flee, that is, to sign in and receive a voting authority slip but leave without actually voting. Board workers were instructed to void the voting authority slip used for that voter if they saw this happen. * * * When voter authority slips exceeded the machine tally, it was because some voters walked out without voting or failed to follow directions to register the vote." (4a).

The petitioner submits to this Court that the lower courts' decisions rested on evidence that was totally without

precedent or legal relevance. *N.J.R.E.* 401 defines "relevant" evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." This current rule is a codification of the holding in *State v. Huchins*, 241 *N.J. Super.* 353, 358 (App. Div. 1990), which held that in determining whether evidence is relevant, the inquiry should focus on "the logical connection between the proffered evidence and a fact in issue." The issue before the trial court was "how many legal votes were rejected?"

The Petitioner submits that in the instant case, Feldner's testimony was pure speculation and totally irrelevant. Her testimony failed to link the eight voting authorities in question to specifically identified voters who either fled without voting or were confused and did not cast a vote. Her testimony was "so unrevealing as to be irrelevant," *State v. Allison, 208 N.J. Super.* 9, 17 (App. Div. 1995); see also *McCormick on Evidence*, §185, at 774 (4th ed. 1992).

Her testimony did, however, have the clear and unmistaken capacity to confuse and mislead the factfinder and the Appellate Court away from the real issue -- that eight votes were never tabulated and they constituted a number sufficient to overturn the election results!

POINT II THE CONSTITUTIONAL VALIDITY OF *N.J.S.A.* 19:52-3 IS AN ISSUE OF GREAT PUBLIC IMPORTANCE BECAUSE AS THE STATUTE IS APPLIED, IT IS REPUGNANT TO THE CONSTITUTIONAL PRINCIPAL OF "ONE PERSON, ONE VOTE."

N.J.S.A. 19:52-3 clearly states "No voter after having entered and emerged from the voting booth shall be permitted to re-enter the same on any pretext whatsoever."

This statute was enacted to deter fraud, safeguard the secrecy of the ballot and to preserve the enfranchisement of qualified voters. *In re Matter of Petition of Byron*, 165 *N.J. Super.* 468, 474 (Law Div. 1978). It was meant to keep individuals from casting more than a single vote.

According to the facts of the instant case, Mrs. Messinger, a Democratic poll watcher, arrived at 9 a.m., filled out a voting authority, and voted. (3T 52-3 to 8). When she stepped out of the booth, other voters behind her who were in line to vote, voted. "People [were] walking in and voting on that machine." (7T 10-1 to 6). Some minutes later, according to Republican challenger Bancroft, Ralph Slater, a Democrat poll worker approached Mrs. Messinger and asked, "Did you press the button?" to which she replied, "Ralph, I"m not stupid." (7T 9-8 to 16). He then proceeded to convince Messinger to vote a second time. (7T 9-20 to 21).

Mr. Slater testified that he telephoned Eileen Feldner, Superintendent of the Board of Elections, and that she personally told him that Mrs. Messinger should re-enter the voting machine and cast another vote. (3T 64-19 to 24). The Petitioner submits that it is not credible that Feldner would instruct Mr. Slater to tell Mrs. Messinger to flagrantly violate election law.

The Petitioner submits that the trial court erred in failing to invalidate Mrs. Messenger's second vote, and erred a second time in failing inquire as to how she voted as per *N.J.S.A.* 19:29-7. Presumably, since Messinger was a Democratic poll watcher, she voted for fellow Democrat Plawker, and Defendant Plawker would have lost another vote in his slim margin at the polls.

The legal principal governing the trial judge's erroneous failure to invalidate Mrs. Messenger's vote is clearly governed by *Ramsey v. Morris*, 121 *N. J. Super.* 430 (Cha. Div.

1972), which held "If the legislative intendment is clear and unambiguous, the court will not * * * indulge in a presumption, arising from extrinsic evidence, that the Legislature intended something other than what it actually expressed." *Bass v. Allen Home Improvement Co.*, 8 *N.J.* 219 (1951). "A construction that will render any part of a statute inoperative, superfluous or meaningless, is to be avoided. * * *" See *In re Keogh-Dwyer*, 106 *N.J. Super.* 567, 571 (Law Div. 1969), aff'd 54 *N.J.* 523 (1969).

Petitioner submits that the failure of the trial court to discount Messenger's second vote was clearly in error. Her second vote served to cancel or dilute a vote legally cast by another — a violation of the Constitution's "one person, one vote" principal.

POINT III THE PETITIONER'S 14TH AMENDMENT RIGHT TO A FAIR TRIAL WAS DENIED BY COURTS WHICH ALLOWED VOTES TO BE VALIDATED BY HEARSAY, EXTRINSIC EVIDENCE, AND JUDICIAL PRACTICES TANTAMOUNT TO ABUSE OF DISCRETION

A. The trial judge's liberal construction of "residency" and admitting hearsay to overcome petitioner's proofs that certain voters were not residents, denied the petitioner's right to confrontation, cross-examination, and a constitutionally fair trial.

During the trial, several Democratic absentee voters were challenged because they were non-residents. For example, the four Clementes voted absentee from Florida. Their non-residency was discovered when service was attempted. Their votes were originally challenged because Petitioner's handwriting expert opined that their signatures were not

genuine. The trial judge failed to declare the four Clemente votes illegal for non-residency and deduct four votes from Plawker's total based on Petitioner's proofs indicating their Democratic political persuasion.

While the election laws regarding absentee ballots are to be liberally construed to avoid disenfranchisement, voting by absentee ballot is not an absolute right. See *In Re Petition of Battle, supra* at, 236; *Mulcahy v. Bergen County Board of Elections*, 156 *N.J. Super.* 429 (Law Div. 1978); and *Antieau, Municipal Corporation Laws*, §17.19 at 568.1 (1973). The maintenance of the integrity of the elective process is a primary concern. *In re Petition of Battle, supra* at 236-237.

In Application of Murphy, 101 *N.J. Super.* 163, 170 (App. Div. 1968), the court ruled "Proof as to how an 'illegal voter' voted may take several forms. Upon a determination by the court that a voter is not qualified, he may be compelled to disclose for whom he voted." *N.J.S.A.* 19:29-7. Furthermore,

> [c]ircumstantial evidence is admissible to prove for whom illegal votes were cast at an election. * * * Among the circumstances that may be considered are * * * [t]he party affiliations of the voter, and the relations between the voter and the candidates, or between him and others actively interested in advancing the cause of certain candidates, * * *." *26 Am. Jur. 2d*, Elections, §348. *Id.*

Roger Plawker, Esq. was most certainly a non-resident who voted absentee for his Defendant father. During the trial, he testified that he lived at an apartment in Hoboken with his girlfriend with whom he had signed a "residential" lease, (2T 154-10 to 16), a fact corroborated by the landlord. (2T 141-25 to 150-22). Roger testified that the apartment was also his

law office. He admitted that he slept and kept his clothes there. His car registration, bank records, and credit cards indicated his Hoboken address. (2T 150-25-1 to 156-7). And although Roger never filed a Title 19 Declaration of Residency, he maintained that he was a resident of his father's house in Englewood Cliffs even though he stayed there overnight only "on occasion." (2T 164-4 to 9). The trial judge found Roger Plawker a resident of Englewood Cliffs.

Julie Globus was an itinerant student who lived in Israel for four years, (2T 73-15 to 19), spent two weeks at her parents home in Englewood Cliffs in October of 1995, (2T 74-8 to 15), then bought and moved into a condo in North Bergen. (2T 76-25). She stated to the court

> We were officially out of my parents' house some time in late October, mid to late October, and we have now been in North Bergen since then and we are planning to go back to Israel in two years. (2T 74-15 to 18).

The Petitioner submits that the trial judge's ruling that Mrs. Globus had sufficient contacts with her parents in Englewood Cliffs to use their address for voting purposes is a clear judicial abuse. (2T-129-1 to 23).

On October 8, 1994, registered Democrat Maria Marinuzzi Tullo married and with her husband moved to Englewood (not to be confused with Englewood Cliffs). Her driver's license showed her to be an resident of Englewood as of March of 1995 as did her auto registration and insurance. (3T 81-8 to 20; 89-8 to 14). The Tullos eventually purchased a house in Englewood Cliffs but the closing occurred after the General Election on November 20th. (3T 95-3 to 11). The trial court declared her to be a resident of Englewood Cliffs and allowed her vote to stand! (3T 108-10 to 14).

The Petitioner submits that the trial judge used his liberal construction rule for "residency" as a wholesale license to declare all votes to be valid, irrespective of the evidence to the contrary — and that his liberal use of this rule precluded the Petitioner's goal of acquiring the six votes necessary to overturn the election.

In *Maplewood*, the court sanctioned the practice of applying a more "lenient standard for proof of election domicile than might apply elsewhere" because such a practice would injure the rights of legal voters. "The interest to be protected here is that of the "public interest." The interest of the voters who are legally entitled to vote is not to have their votes diluted by illegal voters." *Maplewood, supra* at 704. The *Maplewood* Court lamented

> Why grant an illegal voter greater protection than afforded a legal voter? It is obvious that an illegal voter, by voting wrongfully, dilutes the rights and votes of all legally qualified voters. Thus the illegal voter should be afforded no greater protection than a legal voter. *Id.*

The Petitioner submits to this court that not only was the trial judge's evidentiary rulings prior to his decision clearly erroneous and fatally prejudicial to the Petitioner's complaint, they also qualify under New Jersey's abuse of discretion test. *In State v. Roth*, 95 *N.J.* 334 (1984), the court held that 1) the exercise of discretion by a trial court must be based upon findings of fact that are grounded in competent, reasonably credible evidence, and 2) the "factfinder [must] apply correct legal principles in exercising its discretion." The *Roth* Court ruled that they would exercise their powers of judicial review when the trial court's application of the facts to the law was such a "clear error of judgement that it shocks the judicial conscience."

B. Six (6), not five (5), signatures were opined to be not genuine by Petitioner's handwriting expert, a sufficient number to change the results of the election.

The Petitioner submits to this reviewing Court that she was denied a fundamentally fair trial pursuant to the 14th Amendment when the trial judge refused to allow her handwriting expert to testify, violating *N.J.R.E.* 611(a)(1), which gives the trial judge "reasonable" control over the presentation of evidence so as to "make the interrogation and presentation effective for the ascertainment of truth." In *Cardell, Inc. v. Piscatelli*, 227 *N.J. Super.* 149, 154-155 (App. Div. 1994), the court held that a trial judge "should not infringe upon the right of all parties to litigation to present witnesses, as that is an essential element in the conduct of a trial." Furthermore, in the instant case, the Petitioner submits that the judge's decision to deny her the right to present expert testimony, deprived her of due process which is the hallmark of a fair trial.

The trial record is clear. According to the handwriting expert's report which was entered into evidence, the expert would have presented credible evidence which could have overturned the election results. (See handwriting expert's report at 25a). The judge's ruling removed the Defendants' burden to prove that the expert's testimony was not credible. They were relieved of the burden of producing a counter-expert, or the voters themselves to attest to their signatures.

The Petitioner submits to this reviewing Court that the trial judge's ruling tipped the scales of justice in favor of the Respondents, causing the Petitioner irreparable prejudice. The record is clear. On the last day of the trial, the Petitioner

submitted a report from her handwriting expert,[3] to the court, (25a), which was entered into evidence. At this point in the trial, inasmuch as the court had already ruled against the Petitioner on the issue of the eight open ballots, the Petitioner was prepared to prove by expert testimony, that six more votes had been illegally cast for Defendant Plawker. "Six" was the precise number of votes the Petitioner needed to overcome the results of the election.[4]

The trial judge based his denial of the expert's testimony on his finding that even if the Petitioner's expert proved that *five* absentee ballots were illegal, this was an insufficient number to change the results of the election. This finding was particularly egregious inasmuch as the trial judge had a copy of the report before him and the Petitioner pointed out to the court that *six, not five*, signatures were challenged by the expert's report. Regardless, the judge ignored the report and the Petitioner, ruling that only five signatures were challenged. (8T 6-14 to 19; 7-17 to 20).

The expert's report was very concise and clearly written. In it, the expert opined that with regard to certain ballots, six signatures were not genuine, to wit

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[3] It should be noted by this reviewing Court that the Petitioner's handwriting expert, Patricia Siegel, was well-qualified to testify before the instant court, having been deposed as an expert many times in State and federal courts.

[4] Petitioner's attorney told the court "Dr. Sank is instructing me to challenge Gregory Zolla's [sic] vote as a result of what the handwriting expert has divulged." (8T 6-14 to 19). Furthermore the court specifically asked the Petitioner's attorney "Mr. Morrow, does this report help you with six or five votes?" Morrow replied, "Well, assuming that Gregory Zolla [sic] [is in] question now, I would say six." (8T 7-17 to 20).

1) Stephanie Zola
2) Gregory Zola
3) Anna Clemente
4) Maddalena Clemente
5) Vinny Clemente
6) Donato Clement

The "Opinion" section of the two page report, contained two sub-sections which were typed in bolded and underlined type, drawing the attention of the reader to the fact that *two* Zola siblings were part of one opinion, and the *four* members of the Clemente family were a part of a second opinion.

In her report, the expert opined that Penni Zola,[5] the mother of siblings Stephanie and Gregory, had filled out their Voter Registration forms. The expert also pointed out that Stephanie Zola's and Gregory Zola's registration forms were "signed September 15th and 16th respectively, but were witnessed by Ilan Plawker [the Defendant] on August 2, 1995."[6] The Petitioner submits that regardless of whether the signatures were genuine, the fact that the candidate witnessed the absentee ballot applications "in blank," the two votes for Plawker, should have been declared illegal!

Neither Gregory or Stephanie Zola appeared in Court to legitimize their votes.[7] When the Petitioner's counsel began to

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5 During the trial, Penni Zola, Gregory's mother testified that she saw her son sign the registration form. The Petitioner submits that the mother's testimony was tainted and self-serving inasmuch as the handwriting expert opined that the mother signed her children's registration forms. (8T 6-24 to 7-6).

6 The mother of the Zola siblings testified that her daughter had lived and voted in California (8T 102-5 to 8; 8T 10-1 to 3), and by the time the trial convened, Stephanie was working and living in New York city. Stephanie was served at her residence in New York.

7 When service was attempted for Stephanie Zola in Englewood Cliffs, the process server noted that he was told that she lived in New York where she was later served.

request bench warrants to compel appearances, the trial court ignored his request, and proceeded to move the case forward. (6T 82-2 to 12; 7T 65-9 to 15; 7T 75-20 to 76-11). The trial court did, however, expressly overrule the Defendant's objection to allowing the handwriting expert to challenge Gregory Zola's signature! (6T 99-23 to 100-19). Gregory was the sixth voter challenged by the Petitioner.

In addition to the Zola siblings, the Petitioner's expert opined in her report that the four signatures on the Clemente family's absentee ballots were not genuine.[8]

POINT IV UNTIL THIS COURT SETTLES THE CONSTITUTIONAL ISSUES PRESENTED HEREIN WHICH LOWER COURTS HAVE HERETOFORE DECLINED TO ADDRESS, VOTERS AND CANDIDATES FOR PUBLIC OFFICE WILL BE INJURED AND THESE ISSUES WILL CONTINUE TO EVADE REVIEW.

Although a resolution of the questions presented in this case could be characterized as "moot" insofar as the time has passed wherein Petitioner could serve on the Englewood Cliffs council by being granted a new election, the Petitioner will continue to be injured by the onerous application of the rules and statutes complained of herein because the injuries sustained by the Petitioner are surely capable of repetition.[9] Furthermore, inasmuch as the New Jersey courts continue

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[8] The Clementes were non-resident voters. Three were served at their residence in Florida and Donato was served at his business location, a bakery, in Florida.

[9] Petitioner is currently the unopposed candidate in the Republican Primary for the office of council in Englewood Cliffs on the date of the filing of this Petition.

and the appellate and Supreme Court refuse to settle these meritorious issues, they will continue to evade review.

Petitioner relies upon this Court's ruling in *Morse et al. v. Republican Party of Virginia*, ___ *U.S.* ___ (1996). In that case the Court took note that "Like other cases challenging electoral practices, *** this controversy is not moot because it is 'capable of repetition, yet evading review.'" Citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

CONCLUSION

For all of the aforementioned reasons, the Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se*
Date: May 22, 1999

APPENDIX A

SUPREME COURT OF NEW JERSEY
C-732 September Term 1998
47,210

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS

ON PETITION FOR CERTIFICATION

(DIANE SANK - Petitioner)

(Stamp)
FILED FEB 24, 1999
/s/ Stephen W. Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3456-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of February, 1999.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

(Stamp)
I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT OF NEW JERSEY

(Stamp)
/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3456-95T3F

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS

(Stamp)
FILING DATE
APPELLATE DIVISION
DEC 7, 1998
/s/ Emille R. Cox
CLERK

Submitted November 10, 1998--Decided (Stamp) DEC 7, 1998

Before Judges Muir, Jr., and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Diane Sank, appellant, filed a *pro se* brief.

Peter Verniero, Attorney General of New Jersey, attorney for respondents Bergen County Superintendent of Elections and Bergen County Board of Elections (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Susan C. Berger, Deputy Attorney General, on the brief).

Oury & Mizdol, attorneys for respondent Ilan Plawker (Dennis J. Oury, of counsel and on the brief).

PER CURIAM

Plaintiff, Diane Sank, appeals from her unsuccessful

contest of the election for a seat on the Borough Council of Englewood Cliffs (Council), the term for which commenced on January 1, 1996, and is to end on January 1, 1999. She received the third highest number of votes, and contested the election of Ilan Plawker, who received the second highest number, eight more than plaintiff. Plaintiff sought either that the election be set [p. 2] aside, or that she be declared the winner of the second Council seat.

Plaintiff alleged in her complaint that certain absentee ballots were defective (count one); certain non-residents were permitted to vote, either at the polls or as absentee (count two); confusion caused by a new type of voting machine caused voters to flee (count three); Plawker and his political allies conspired to alter the absentee ballot process (count four); and Board workers failed to follow correct procedures in issuing and recording voting authorities (count five).

The matter was tried before Judge Troast in seven days between January 2 and 12, 1996. The judge found that three votes were invalid based on non-residence of the voters. After two of those voters testified that they voted for Plawker and not Sank, the court reduced Plawker's tally by two. After the third voter testified that he voted for both Plawker and Sank, the judge reduced both tallies by one, leaving a six-vote lead for Plawker.

The judge refused to set aside the election on the ground that the new machines caused voter confusion. He found that, although there was an eight-vote discrepancy between the number of authorities to vote and the number of votes reported on the machines, the level of error was not unusual and did not indicate an unfair result. In arriving at that conclusion, the judge accepted the testimony of Superintendent Eileen Feldner who testified that it was not unusual, with any machine, for a voter to flee, that is, to sign in and receive a voting authority

slip [p. 3] but leave without actually voting. Board workers were instructed to void the voting authority slip used for that voter if they saw this happen. Feldner testified, based on her five years of experience as Superintendent and previous twelve years of experience as a Commissioner on the Board, that when voter authority slips exceeded the machine tally, it was because some voters had walked out without voting or failed to follow directions to register the vote.

After considering the testimony concerning challenged individuals (mostly absentee) voters, the judge invalidated two of the votes probably cast for Plawker, but concluded that there was an insufficient basis to set aside enough additional votes to change the result of the election.

During the course of the trial, Judge Troast refused to accept the testimony of plaintiff's handwriting expert, Patricia Siegel. At the time Judge Troast made that decision, Siegel's testimony, based upon the report that she issued, placed only five votes in question. Judge Troast determined that such testimony would be irrelevant because Plawker then maintained a lead of six votes in the tally.

On the last day of trial, plaintiff's counsel named seven voters whose votes were still at issue. He admitted, however, that he was not "read to go forward with those at this time" because witnesses necessary to challenge those votes were not "made available to [him]." Thus, he was unable to call any witnesses. Judge Troast declared an end to the proceedings [p. 4] stating, "I can't speculate as to what the plaintiff might be able to produce if she was given unlimited time."

During the course of the trial, Judge Troast also granted plaintiff's counsel's request to be relieved from arguing the conspiracy theory which counsel believed lack a good faith basis. Plaintiff's counsel explained that he wanted to argue only that certain ballots had technical defects without

attempting to prove a conspiracy. Plaintiff herself declined to testify on that issue or to make a proffer of proof. Indeed, plaintiff abandoned the conspiracy allegations and later moved to dismiss count four of her complaint. She explained in a letter to the court that she agreed with the court that *pro se* representation on the issue would be unwise. Accordingly, the court dismissed the conspiracy count of the complaint.

Both before and during trial, Judge Troast declined to grant adjournments and continuances because the matter was an election case and by necessity should "proceed as expeditiously as possible." His ruling was made, undoubtedly, in light of the requirements of *N.J.S.A.* 19:29-4, *N.J.S.A.* 19:29-5 and case law on the subject. See *In re Smock*, 5 *N.J. Super.* 495, 504 (Law Div. 1949). Notably, the trial of this case was not concluded until more than two months after the November 7, 1995, election and more than two weeks after January 3, 1996, when the new Council members took office.

On appeal plaintiff presents the following issues which we have reworded. [p. 5]

I. WHETHER THE COURT ERRED BY EXCLUDING THE TESTIMONY OF THE HANDWRITING EXPERT?

II. WHETHER THE COURT ERRED BY FINDING THAT THE EXPERT'S REPORT CAST INTO QUESTION FIVE, INSTEAD OF SIX, SIGNATURES?

III. WHETHER THE COURT ERRED BY ENDING THE TRIAL ABRUPTLY AND PREMATURELY?

IV. WHETHER THE COURT ERRED BY DENYING PLAINTIFF'S RIGHT TO PROCEED PRO SE WHEN HER ATTORNEY SOUGHT TO BE RELIEVED AS COUNSEL?

V. WHETHER THE COURT ERRED BY FORCING PLAINTIFF TO PROCEED PRO SE ON THE CONSPIRACY PORTION OF THE TRIAL?

VI. WHETHER THE COURT ERRED BY ALLOWING PLAWKER'S ATTORNEY TO THREATEN HER?

VII. WHETHER THE COURT ERRED BY DENYING PLAINTIFF'S MOTION TO ADJOURN?

VII. WHETHER THE COURT ERRED BY REMAINING IN SESSION IN THE AFTERMATH OF A SEVERE SNOW STORM?

IX. WHETHER THE COURT ERRED BY PREVENTING HER SON FROM SERVING SUBPOENAS?

X. WHETHER THE COURT ERRED BY FAILING TO FIND THAT CONFUSION AT THE VOTING MACHINES REQUIRED REVERSAL OF THE ELECTION RESULTS?

XI. WHETHER THE COURT ERRED BY LETTING STAND MESSINGER'S VOTE, DESPITE HER TWO VOTING ATTEMPTS?

XII. WHETHER THE COURT ERRED BY LETTING STAND SCHERL'S VOTE, DESPITE A DEFECT IN HER APPLICATION FOR ABSENTEE BALLOT?

XIII. WHETHER THE COURT ERRED BY FINDING CREDIBLE SLATER'S TESTIMONY THAT HE VOTED FOR BOTH PLAWKER AND PETITIONER?

[p. 6] Issues six, nine, and eleven are raised for the first time on appeal.[1] An appellate court will not consider

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[1] The fact that Judge Troast struck the issue of whether plaintiff's son could be appointed "Special Process Servicer" from the Order Fixing Date for Hearing, filed on December 8, 1995, does not constitute an adjudication on the merits, but

questions or issues not presented to the trial court unless those issues "go to the jurisdiction of the trial court or concern matters of great public interest." *Nieder v. Royal Indemnity Ins. Co.*, 62 *N.J.* 229, 234 (1973). None of the exceptions to the general rule appear in this case. Accordingly, we will not consider the merits of issues six, nine, or eleven.

As to the remaining issues, our review of the record satisfies us that after giving deference to Judge Troast's ability to assess the credibility of the witnesses, the judge's findings of fact and conclusions of law are amply supported by the credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 *N.J.* 474, 484 (1974). Therefore, none of the issues presented by plaintiff on appeal warrant our intervention or require additional discussion. *R.* 2:11-3(e)(1)(A) and (E). The judgment under review is affirmed substantially for the reasons stated by Judge Troast on the record.

Affirmed.

(Stamp)
I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Emeille R. Cox
CLERK

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simply an indication that the judge believed that it was not an appropriate issue to address on the appearance date of December 20, 1995. Plaintiff never sought an explanation from the judge, on the record, as to the merits of the request.

APPENDIX C

OURY & MIZDOL, P.C.
411 Hackensack Avenue
Hackensack, New Jersey 07601
Attorneys for Respondent

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO: L-11960-95

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE THE [sic] ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS PURSUANT TO N.J.S.A. 19:29-1, ET. SEQ.	CIVIL ACTION CONSENT JUDGMENT
Plaintiff	

THIS MATTER having been tried before the Court by and in the presence of Stanley L. Morrow, Esq., attorney for plaintiff, Diane Sank, Susan Berger, Esq., Deputy Attorney General, appearing on behalf of the Bergen County Board of Elections, and Superintendent of Elections, and Dennis J. Oury, Esq., appearing on behalf of the Respondent, Ilan Plawker, and the Court having heard the testimony and argument of counsel, and having made findings of fact and conclusions of law as more fully set forth on the record, and good cause having been shown:

IT IS on this 18th day of January, 1996;

[p.2] ORDERED and ADJUDGED, that Judgment be and the same hereby is entered in favor of respondent, Ilan Plawker and against the plaintiff, Diane Sank and that the

election for the office of council in the Borough of Englewood Cliffs held on November 7, 1995 in which Ilan Plawker was elected be and the same hereby is confirmed.

/s/ Arthur L. Troast
Honorable Arthur L. Troast, J.S.C.

I hereby consent to the form
and entry of the within Judgment.

[2]
Stanley L. Morrow, Esq.

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[2] Petitioner instructed her attorney, Stanley L. Morrow not to sign the Consent Judgment.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION -- BERGEN COUNTY
DOCKET NO. L-11960-95
APPEAL NO. A-

IN RE 1995 GENERAL ELECTION FOR THE OFFICE OF COUNCIL IN THE BOROUGH OF ENGLEWOOD CLIFFS, COUNTY OF BERGEN

TRIAL
(transcript)

Place: Bergen County Courthouse
Hackensack, New Jersey
Date: January 12, 1996

BEFORE

HON. JUDGE ARTHUR L. TROAST, J.S.C.

ORDERED BY:

Dr. Diane Sank
173 Charlotte Place
Englewood Cliffs, New Jersey 07632
Tel No. 201-567-7297

APPEARANCES:

STANLEY MORROW, ESQ.
Attorney for Diane Sank.

SUSAN BERGER, ESQ. Deputy Attorney General
Attorney for Bergen County Board of Elections and
Bergen County Superintendent of Elections

DENNIS OURY, ESQ.
Attorney for Ilan Plawker

Reported by: Kathleen Dabrowski, C.S.R.
Official Court Reporter
Bergen County Courthouse
Hackensack, New Jersey 07601

Colloquy

[p. 37] THE COURT: All right. In this case the plaintiff seeks to set aside the election generally on the basis that the electronic machines which were used at the last election November 7th, 1995 caused problems, and in particular alleges that since there is a discrepancy of eight between the number of authorities to vote and the number of votes on the machine, that the Court should set aside the election. This, of course, is a particular basis upon which the plaintiff seeks to set aside the election. The lawsuit and the trial, of course, involve other issues as well. [p. 38]

In this case there was testimony with regard to the operation of the new machines. The Court heard the testimony of the Superintendent of Elections with regard to the selection of new machines and the use of new machines in Englewood Cliffs as well as in other municipalities. They were valid reason for using new machines, new and different machines instead of the old machines which had been used for elections.

I have heard and observed the witnesses who testified as to what happened in Englewood Cliffs in connection with the use of the new machines. Obviously when there is a change things don't work the same way they worked before the change. However, in my opinion the plaintiff had not established sufficient basis to vacate or set aside this election because of the use an operation of the new electronic machines in Englewood Cliffs at the time of the election in question. The proofs indicate that the new voting machines were operating at the time of the election in Englewood Cliffs. The proofs indicate that any voter who went the polls had an opportunity to vote on the new machines. The proofs indicate that there were instructions and directions and assistance was available for anyone who wanted assistance in connection with the use of the new machines. The Court finds there was

no breakdown of the machines. The Court finds that the machines operated properly at the time of the election. The Court also finds that the plaintiff has failed to establish that the [p. 39] Superintendent of the Elections or any voting officials failed to properly install and make the machines available at the time of the election in Englewood Cliffs.

Admittedly there was a discrepancy between the authorities and the votes reported on the machines. We never have a perfect election. The Court finds that there was probably no greater discrepancy in connection with the use of the new machines than there were with the old machines in Englewood Cliffs.

In short, this is not a case where the plaintiff has brought in voters who contend that they were unable to vote at the time of the election. This is not a case where the machines broke down at the time of the election.

The Court took into account the testimony of the individuals who testified to the election in Englewood Cliffs and I fail to find any sound basis for setting aside the election because of the use of the new electronic voting machines at the time of that election. The plaintiff had a burden here to demonstrate that there were illegal votes cast at the election which would have changed the result of the election. This is an election where defendant Plawker received 1,009 votes and plaintiff Sank received 1,001 votes. The Court did invalidate two of the votes which were probably cast for Plawker. However, the Court concludes that there isn't sufficient basis to set aside sufficient number of votes in [p. 40] addition to the two votes that were held invalid to change the results of this election.

I have taken into account that the plaintiff has retained a handwriting expert and that the handwriting expert would testify as to certain signatures and that it's possible that there

would be five votes changed in the tally at the time of the recount. However, those five possible changes plus the two changes that the Court determined based upon invalid ballots are insufficient to change the result of this election.

The Court heard the proofs in this case. The Court, of course, had authority to determine what the facts are and structure a remedy. Under the law the plaintiff was entitled to a remedy. This is not a case where the plaintiff has proved that there was fraud at the time of the election. This is a case where the plaintiff originally alleged a conspiracy but has withdrawn the conspiracy charge. Unfortunately, plaintiff, Dr. Sank, has limited financial means to finance the election contest. She was furnished with assistance by able counsel, Mr. Morrow. Mr. Morrow presented her case. Dr. Sank was there at Mr. Morrow's side, the two of them presented what proofs were available, and they represented to the Court what else might be available. However, I have decided that it is appropriate for the Court to give a decision today. I can't speculate as to what the plaintiff might be able to produce if [p. 41] she was given unlimited time. In my opinion the proofs presented to the Court at this trial are insufficient for the Court to change the result of the election insofar as the parties in this case are concerned. My opinion, the proofs are insufficient for the Court to order a new election for any reason in this case. Accordingly, I am going to dismiss the complaint in the case.

Anything else to be decided counsel?

MS. BERGER: Not at this point, Judge. Thank you very much. I will submit an Order.

MR. MORROW: Thank you, your Honor.

THE OFFICER: Judge, shall I return the evidence?

THE COURT: I believe the evidence should be returned to counsel. The record will so indicate.

(Court is adjourned at 11:45.)

CERTIFICATION

I, Kathleen Dabrowski, C.S.R., license number XI 00539, an Official Court Reporter, in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of my stenographic notes takes in the above matter to the best of my knowledge and ability.

/s/ Kathleen Dabrowski
Katnleen Dabrowski, C.S.R.
Official Court Reporter
Bergen County Courthouse
Hackensack, New Jersey 07601

Date: 3/12/96

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4832-97T3

IN THE MATTER OF CANDIDATES
TO NEW JERSEY GENERAL ASSEMBLY

Argued August 11, 1998 -- Decided SEP 2, 1998

Before Judges Long, Carchman and Steinberg.

On appeal from Superior Court of New Jersey, Law Division, Burlington County.

Anthony T. Drollas argued the cause for appellant (Capehart & Scatchard, attorneys; Mr. Drollas, on the brief.)

John P. Harrington argued the cause for respondents (Barry & McMoran, attorneys; Mr. Harrington on the brief.)

Peter Verniero, Attorney General, attorney for the State of New Jersey (Francine W. Kaplan, Deputy Attorney General, on the brief.)

PER CURIAM

This appeal centers on the meaning of N.J.S.A. 19:29-1(e) which provides that voters may contest a nomination or election "when illegal votes have been received, or legal votes rejected at the polls sufficient to change the result." At issue is whether the mere existence of unrecorded legal votes in a number exceeding the margin of victory is enough to set aside the election results. We think it is.

[p. 2] The case arose out of a contest for two Assembly

seats in the Seventh Legislative District which includes various portions of Burlington and Camden Counties. The facts are not in dispute. An election took place on November 4, 1997 in which Democratic candidates, Herb Conaway and Jack Conners, and Republican candidates, Kenneth Faulkner and George Williams, vied for the two seats. The original election results showed Conaway and Faulkner as the winners. However, Conaway and Conners petitioned the Superior Court, pursuant to *N.J.S.A.* 19:29-2, for a recount of all paper ballots and a recheck of the voting machines. A recount and recheck was held and as a result, Conners was declared the winner over Faulkner. The actual tally was as follows:

Conaway - 27457
Conners - 27409
Faulkner - 27335
Williams - 25214

A certificate of election was issued to Conaway and Conners who have since been sworn into the Assembly representing the Seventh Legislative District.

On December 3, 1997, Faulkner and Williams filed a Verified Petition in the Superior Court, Law Division, challenging the outcome of the election.[3] As a result of a further recheck of certain voting machines ordered by the trial judge, it was determined that voting machine #19003 in the

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[3] Actually, they filed two petitions with the Clerk of the Superior Court, Law Division, one in Burlington and one in Camden County. This dual filing was required by the geographic overlap of the Seventh Legislative District between portions of Burlington and Camden counties. The matter was ultimately heard by a Burlington County Superior Court Judge.

32nd local election [p. 3] district of Willingboro had malfunctioned and failed to record all of the votes cast. The machine recorded only 93 votes from a total of 275 persons who entered the voting booth. Experts for both sides agreed that if 275 persons entered the voting booth, there is a statistical expectation of fall-off of between 8% and 13% in terms of the number of votes cast in the assembly race. In other words, Faulkner's expert opined that 253 assembly votes were cast, thus establishing the number of unrecorded votes at between 130 and 160. It is not necessary to resolve which of these numbers is correct because both exceed the margin of victory of 74 votes which separated Conners and Faulkner.

On February 9, 1998, Faulkner and Williams[4] filed a Motion for Judgment Setting Aside the Election pursuant to *N.J.S.A.* 19:29-9. The judge scheduled a hearing with respect to the Motion. In the interim, the judge obtained from the Burlington County Superintendent of Elections copies of the results of general elections held within the Township of Willingboro during the years 1992-1997. By letter, the judge requested that the parties submit legal arguments with respect to the propriety of taking judicial notice of those election returns for the purpose of predicting how the missing votes

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[4] [p. 4] During the hearing on the motion to set the election aside, the judge determined that the movants had proven that the subject voting machine had malfunctioned, and that a number of votes had not been recorded by the machine in an amount greater than Conners' 74 vote victory margin. Those findings are not contested here. According to the movants, that should have been the end of the inquiry. Because the number of unrecorded votes exceeded the victory margin and because it could not be ascertained with certainty how these votes were cast, they argued that a new election was required.

were cast. Faulkner and Williams objected to the taking of judicial notice of historical election returns.

The judge disagreed. Citing *In Re Application of Abbott Low Moffat*, 142 *N.J. Super.* (App. Div. 1976), he concluded that the issue in a case like this is not simply whether the total of the unrecorded votes exceeds the victory margin. Rather, he viewed his role as requiring an assessment of how these votes would have been cast. To do this he looked at the voting pattern in District 32 from 2992 to 1997:

> We first start with the proposition that the registration in this district is nearly four to one in favor of the Democrats. Now it is also true, and to be perfectly fair about it, I should mention that there is also a substantial number of undeclared voters in this district. But, the specific registration as between Democrats and Republicans show approximately a four-to-one registration.
>
> To review the years which I reviewed, demonstrates even more strongly, in my view, the voting pattern in this particular Willingboro district. In 1992, for instance, when Clinton and Bush were at the top of the ticket, Clinton polled 239 votes and Bush polled 73 votes, In the race for the Congressional seat, Mr. Ryan polled 178 votes, [p. 5] Mr. Saxton polled only 134 votes. And, of course, he ultimately prevailed. In the race for Sheriff, Mr. Phillips polled 169 votes, whereas the ultimate winner, Mr. Cummings, only polled 111 votes. In the race for Freeholder. Mr. Fellner polled 200 votes, Mr. Farias polled only 99 votes in this particular district.
>
> In 1993 with Florio and Whitman at the head of the ticket, Florio polled 152, Whitman 78. In the race for State Senator in the 7th District in that year, Casey won by 113 to 98. And, significantly enough, in the Assembly race for that year, Anderson and

Sosa, the Republicans, lost to Petrillo and Williams by 107 votes or 103 votes for Sosa to 119 votes. That election or that contest is actually the closest one in Republican -- in the annals of election. But there again, the winners district wide in that particular election lost in the 32nd district.

In 1994 with Lautenberg and Haytaian at the top of the ticket, Saxton once again lost in District 32 by a vote of 106-85. And, Mr. Conda, the County Clerk, although a winner county wide lost in this district by a vote of 140 to 51.

In 1995, with the Assembly race once again at issue, Diane Allen and Carmine DeSopo lost District 32 by a combined total vote of 114 where their adversaries, Dugan and Leisure, won by 173.

In 1996, with again Clinton and this time Dole at the head of the ticket, Clinton beats Dole in this district by 261 versus 56. Saxton, for the third straight time in this particular district, loses by 104 to 164. And Surrogate Conda lost in this district by a vote of 202 to 84.

In addition, of course, to all of that, and I recognize that the parties question from the get-go the accuracy of the machine in District 32, but the fact of the matter is that the machine did count, in this case, in 1997 some 31 votes for the Republicans versus some 68 or so votes for the Democrats; an [p. 6] almost two-to-one showing on those results from this machine that we do have.

In short, not a single Republican candidate for any office, State or Federal, has ever prevailed in District 32 in the last five general elections, and this includes some very, very well-known Republican politicians in the county, such as James Saxton, Elton Conda, Mike Conda, Diane Allen and Carmine Deice, all of whom ultimately prevailed in their respective elections, but failed to prevail in District 32.

> The bottom line of this analysis, based upon these public and highly trustworthy records, is for the court that with reasonable certainty Mr. Faulkner could not have made up his loss out of District 32. If he couldn't, certainly neither could Mr. Williams.
>
> Accordingly, in my view, the petitioners simply have not been able to offer any proof that the 160 votes that they count as unrecorded would have been cast in such a way as to reverse the results of this particular election. For those reasons, the respondents' motion to dismiss this case is granted and the petitioners' motion to overturn the election and to be followed by some remedy hereafter set forth is respectfully denied. The election of Mr. Conaway and Mr. Conners stand.
>
> I do not see this result as a defeat or a perversion of the popular will, but a vindication of it. Remember, this decision does not add one single vote to the totals of any of these four candidates. It merely rules that an entire 7th District election involving the casting of over 100,000 vote for two of the 7th District Assembly seats cannot be affected or set aside based upon 160 unrecorded votes in a District which would have with reasonable certainty favored the declared winners.

Faulkner and Williams appeal, contending that the judge erred in taking judicial notice of the other election returns and in refusing to order a new election once he ascertained that the [p. 7] unrecorded votes exceeded the victory margin. While we agree with the trial judge that prior election returns are, in general, proper subjects of judicial notice under *N.J.R.E.* 201(b)(3), it is in connection with his use of those records in this case that we part company from him and reverse.

We now begin our analysis with the statute. In order to successfully contest election results under *N.J.S.A.* 19:29-1(e), a contestant must prove either that "illegal votes have

been received, or legal votes rejected at the polls sufficient to change the result." When illegal votes are the issue

> the contestant has not only the burden of showing that illegal votes were cast in number sufficient to change the result if they had in fact been cast for the contestee, but also the burden of showing, to the extend possible under the circumstances, for whom the illegal votes were cast. *[Application of James T. Murphy, 101 N.J. Super.* 163, 167 (App. Div.), certif. denied, 52 N.J. 172 (1968).]

However, as we indicated in Moffat, supra,

> the burden of showing specifically for whom votes were cast, while pertinent in cases of illegality, has no place where the issue is the rejection of legal votes. Cf. *In re Fifteen Registered Voters, Sussex Cty.*, 129 *N.J. Super.* 296 (App. Div. 1974), certif. den. 65 N.J. 577 (1974).[142 *N.J. Super.* at 224.]

More particularly, where legal votes have been rejected, the standard is as follows:

> the contestant's burden would be met by a demonstration that had the votes been cast for him, the result would have been different. This, we believe, is the import of the phrase [p. 8] "sufficient to change the result," contained in *N.J.S.A.* 19:29-1(e). [Id.]

In other words, once the number of unrecorded legal votes is established, all that is required is for the judge to determine whether it exceeds the margin of victory. If so, the movant, has proved his or her case.

Where the trial judge went wrong, we think, is in his reading of Moffat. He concluded that under Moffat, in a case

involving unrecorded legal votes, the movant's burden is not only to show that the number of unrecorded votes exceeds the margin of victory but also that it is highly probable that the unrecorded votes would have been cast for the challenger, thus affecting the outcome. We disagree. In Moffat, only one vote was recorded for Abbot Low Moffat. However, at a hearing, five persons were produced who testified that they had voted for him. This proved that the voting machine malfunctioned and that some votes went unrecorded. Unlike this case, however, no expert testimony was adduced in Moffat to project how many votes were not recorded. We observed:

> It is known that 143 persons used the machine in question. With two members of the local governing body to be elected, there were 286 potential votes. Yet, only 143 were recorded for the four candidates, so that 138 cannot be accounted for. Of course, it does not follow that every voter cast his or her ballot for both positions, and, indeed, some may have voted for neither. Nevertheless, comparing the number of votes cast for Barbara Lependorf with the much smaller totals for the two Republican candidates, and taking into account the glaring disparity between the 100 votes for Ms. Lependorf and the solitary vote for her running mate, there is a compelling [p. 9] inference that a substantial number of votes for Moffat were not recorded. Since only 92 votes separated Peyton and Moffat, the latter would have emerged the victor if he had received, as seems likely, at least as many votes as the other Democratic candidate. [142 *N.J. Super.* at 225-26.]

While at first blush this language may appear to support the trial judge in this case, upon closer review, in the context of the facts in Moffat, it is clear that its purpose was only to

establish the probable number of legal votes which went unrecorded and not to assess how those votes might have been cast. In other words, by our analysis, we supplied that element which the experts established in this case: the unlikely number of unrecorded legal votes. In so doing, it was clearly not our purpose to determine how such votes were cat because, as we said, such an analysis "has no place where the issue is the rejection of legal votes." 142 *N.J. Super.* at 224. Rather, our sole purpose was to determine the probable number of unrecorded legal votes. That this is the correct reading of Moffat flows inexorably from our language which bears repeating: "the contestant's burden would be met by a demonstration that had the votes been cast for him the result would have been different." 142 *N.J. Super.* at 224 (emphasis added). Here it is uncontroverted that Faulkner met his burden by showing that between 130 to 160 iegal votes went unrecorded. If cast for Faulkner, 130 votes would have altered the outcome. That is all he was required to show.

That said, we are unable to ascertain who, as between Conners and Faulkner, won the second seat in the Seventh Legislative [p. 10] District election of November 4, 1997. Thus, in accordance with the provisions of *N.J.S.A.* 19:29-9, a judgment should be entered against Conners, his certificate of election annulled, and the election results set aside. This creates a vacancy in the Seventh Legislative District "otherwise than by expiration of a term," the filling of which is governed by *N.J. Const.* art. IV § 4, ¶ 1 and *N.J.S.A.* 19:27-11.1. According to the Constitution and relevant statute, the unexpired term shall be filled at the next general election which is now scheduled for November 3, 1998. [5]

---

[5] In *In Re Maple Shade General Election, 203 N.J. Super.* 563 (Law Div. 1985) a special election was ordered as a remedy for an election similarly compromised by a

Ibid. Because the primary preceding the general election has passed, under *N.J.S.A.* 19:27-11.1, the representatives of each political party shall select the nominees according to the provisions of 19:13-20a(3).[6] In the interim, the vacancy shall be filled by the members of the county committee of the political [p. 11] [p.11] party of which the prior incumbent was the nominee, from the units which comprise the legislative district. *N.J. Const.* art IV, §4, ¶1. Obviously, in view of the new slate of candidates, voters in the entire Seventh Legislative District shall elect the person to fill the vacant seat.

Reversed and remanded for the entry of judgment consonant with the principles to which we have adverted.

I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/ Emille R. Cox
Clerk

---

malfunctioning voting machine in one district. However, *Maple Shade* was decided prior to the 1988 amendments to *N.J. Const.* art. IV, §4, ¶1 and N.J.S.A. 19:27-11 which deleted the option of holding a special election in order to fill a vacancy occurring in the legislature. The current provisions relating to filling vacancies in the Legislature contained in the Constitution and in *N.J.S.A.* 19:27-11.1 mandate that a vacancy occurring "otherwise than by expiration of a term" shall be filled "only at the next general election."

[6] *N.J.S.A.* 19:13-20a(3) requires that:

> In the case of an office to be filled by the voters of a portion of the State comprising all or part of two or more counties, the candidate shall be selected by those members of the county committee of the party wherein the vacancy has occurred who represent those portions of the respective counties which are comprised in the district from which the candidate is to be elected.

APPENDIX F

PATRICIA SIEGEL ENTERPRISES, INC.
HANDWRITING EXAMINATION
23 SOUTH DRIVE
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(516) 487-5287

(Stamp)
RECEIVED AND FILED
1996 JAN 12 P 12:21
Carol J. Rauety
DEPUTY CLERK
SUPERIOR COURT

REPORT FOR

January 11, 1996

Dr. Diane Sank
173 Charlotte Place
Englewood Cliffs, New Jersey 07632

Re: Superior Court of New Jersey Law Division:
Bergen County, Docket No: L-11960-95
Handwriting identification, councilperson election,
Englewood Cliffs, N.J.

QUESTION

Do the signatures/handwriting on the Certificate of Civilian Absentee Voter (Certificate) and Civilian Absentee Ballot Application (Ballot Application) forms represent the genuine writing of the following voters: Stephanie Zola, Anna Clemente, Maddalena Clemente, Vinny Clemente and Donato Clemente?

COMPARISON MATERIALS

Certificates and Certificate Envelopes: Original documents regarding Stephanie Zola, Anna Clemente, Maddalena Clemente, Vinny Clemente and Donato Clemente.

Ballot Applications, front and back: Original applications regarding Stephanie Zola, Anna Clemente, Maddalena Clemente, Vinny Clemente and Donato Clemente.
Permanent Registration/Registration Application forms: Original forms regarding Stephanie Zola, Gregory Zola, Penni Zola, Ralph Zola, Maddalena Clemente, Vinny Clemente, Donato Clemente, and a photocopy of Anna Clemente's Registration form.
Signature Comparison Records: Original records regarding Anna Clemente, Donato Clemente, Gregory Zola, Penni Zola and Ralph Zola.
Request exemplars obtained in Court 1/10/96: Signatures and limited writing of Penni Zola and Ralph Zola.

OPINION

Stephanie Zola and Gregory Zola

It is my opinion that the presumed known standard signatures of Stephanie Zola and Gregory Zola on their Registration Application forms were signed by the same individual. This finding brings into question the validity of both their signatures on their respective forms. Stephanie Zola's and Gregory Zola's Registration Application signatures were signed September 15th and 16th, 1995 respectively, but were witnessed by Ilan Plawker prior to those dates, on August 2, 1995.

[p. 2] The signatures of Gregory Zola on the Signature Comparison Record are significantly different from his signature on the Registration Application and were in my opinion written by different people.

The signatures of Stephanie Zola on the Registration Application, Certificate and Ballot Application were written by the same person as was the signature of Gregory Zola on the Registration Application. The validity of Stephanie Zola's signatures on the Certificate and Ballot Application remains in question, however. It is my opinion that Penni Zola not only wrote the printing and numbers on Stephanie's and Gregory's Registration Applications, numbers 1 though 6, as admitted, but also wrote the printing and numbers on Stephanie's Certificate and Ballot Application. In addition, there are similarities between Penni Zola's signatures/writing and the Stephanie Zola signatures which suggest that Penni Zola may have signed these as well.

Anna Clemente, Maddalena Clemente, Vinny Clemente, Donato Clemente

It is my opinion that the Certificate signatures of Maddalena Clemente and Anna Clemente were written by the same person, that they are both significantly different from their Board of Election signature or signatures, and that they are not genuine.

Donato Clemente's Certificate signature is significantly different from his Board of Elections signatures and is not genuine. Donato Clemente's signature on the Ballot Application is genuine and also significantly different from his signature on the Certificate.

I question the validity of Vinny Clemente's Certificate signature based on the dynamics of the signature and my finding that the printing on the Certificate was executed by the same person who filled out other Clemente family certificates in which the signatures were found to be not genuine.

My opinion is based on comparison of signatures and writing on the Certificates, Ballot Applications and Board of Election Records of the four Clemente family members.

Other Signatories

I determined that several other signatures on Certificates are genuine.

/s/ Patricia Siegel
Patricia Siegel
Handwriting Examiner

Supreme Court, U.S.
FILED
JUL 9 1999
OFFICE OF THE CLERK

No. 98-1895

In The

Supreme Court of the United States

October Term, 1998

Diane Sank

v.

Bergen County Superintendent

Of Elections, et al.

On Petition for a Writ of Certiorari To the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

Diane Sank, Pro Se
173 Charlotte Place
Englewood Cliffs,
New Jersey 07632
(201) 569-7297

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Addendum of Statement of the Case

As of this date, no Respondent to this matter has filed a brief in opposition to this petition which conforms to the rules promulgated by this Court. The time for such a response has run. The Office of the Attorney General, has however, filed with Mr. William K. Suter, the Clerk of the Court, a letter brief, which is often used in lieu of a formal brief pursuant to New Jersey Rules of Court. (See Letter Brief at 1a).

In the letter brief, legal arguments were advanced and authorities cited for the reasons not to grant a writ of certiorari. The letter brief was drafted and signed by Andrea M. Silkowitz, Esq., in her capacity at Assistant Attorney General for the State of New Jersey, sent to the Court on April 23, 1999.

Attached to Respondent's letter brief was a signed waiver form, indicating to this Court that the Office of the Attorney General did not intend to file a response to the petition for a writ of certiorari unless one was requested by the Court. The form indicated that Ms. Silkowitz was filing an appearance as Counsel of Record for Respondents Bergen County Superintendent of Elections and the Bergen County Board of Elections.

Inasmuch as the letter brief advances legal arguments and cites authorities for reasons not to grant a writ of certiorari, the Petitioner submits this reply brief.

POINT I THE ATTORNEY GENERAL'S LETTER BRIEF IS NOT IN CONFORMITY WITH THE RULES PROMULGATED BY THE RULES OF THIS COURT AND SHOULD BE STRICKEN FROM THE RECORD.

Rule 15 of the *Rules of the Supreme Court of the United States* govern the submission, content, and format of briefs in opposition. This rule was not followed by the Attorney General. As a result, Petitioner was placed in a dilemma. She could either ignore the existence of the letter brief and pray that the Court would ignore the document and its arguments -- or she could reply, rebutting the arguments against granting of her petition.

The Petitioner is before this court *pro se*. The Attorney General has an army of attorneys at his command. Petitioner is wary of the reasons that the Attorney General waived his right to file a respondent brief and at the same time send this Court a letter brief. It is impossible for Petitioner not to wonder why the Attorney took this route to file a brief. Was the letter brief filed on the off chance that Petitioner would not reply to it? Given the influence of the Attorney General's office, would the unchallenged letter brief carry weight with the Court, particularly without a reply from the Petitioner?

The logical choice for the Petitioner was to reply. To do otherwise would be to allow the Attorney General's brief to go unchallenged. The Petitioner chooses not to take the risk of allowing the letter brief to go unchallenged.

The Petitioner would ask this Court to strike the letter brief with prejudice for non-conformity with the rules of court. R. 15 of the *Rules of the Supreme Court of the United States*. and refuse any other briefs from the Attorney General that might be submitted in an untimely manner.

POINT II ALTHOUGH THE ORIGINAL RELIEF SOUGHT BY PETITIONER IS NO LONGER POSSIBLE, THE RESPONDENTS CONTINUE THEIR UNCONSTITUTIONAL ELECTION PRACTICES WHILE THE ISSUES EVADE REVIEW.

The Attorney General would have this Court believe that the reasons for granting this Petition are moot and that the reasoning of *Morse et al. v. Republican Party of Virginia*, 517 *U.S.* 186 (1996) have no application to the instant case. The Petitioner submits that the Attorney General is missing the point of the *Morse* Court which assumed jurisdiction of an election case in which the original relief requested was no longer possible but a decision on the merits would prevent the continuation of unconstitutional election practices that continued to infringe upon voter's rights.

The *Morse* Court said in no uncertain terms, "Like other cases challenging electoral practices, *** this controversy is not moot because it is 'capable of repetition, yet evading review,'" citing *Anderson v. Celebrezze*, 460 *U.S.* 780, 784, n. 3 (1983); *Storer v. Brown*, 415 *U.S.* 724, 737, n. 8 (1974); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969).

In the instant case, irregularities in the voting process which dilute and deprive voters of their legally cast votes -- -- continue to plague the voting booths in New Jersey as illustrated by the articles contained in the appendix of this reply brief. They cover a ten year span and contain many instances of alleged voter fraud, tied elections, and those election outcomes which hinge upon a fair determination by a court on the validity of a single vote.

New Jersey, like most states is made up of small towns and municipalities. Elections are won or lost on a single vote. The elections occur frequently. Boards of Election which are

charged with running procedurally fair elections continue to ignore the rules legislated for the protection of the voters and the integrity of the electoral process. To ad insult to injury, the courts capriciously refuse to follow the statutes which govern the electoral process and instead creatively construe the statutes, caselaw, rules of court, and rules of evidence to the general confusion of any party to an action before them.

The instant case before this court is the perfect example of the result of the judicial chaos which continues to wreak havoc in the New Jersey court system -- to the injuries of voters and candidates alike. In the instant case, the trial court ignored the clear meaning of *N.J.S.A.* 19:52-3 which states that "No voter after having entered and emerged from the voting booth shall be permitted to re-enter that same on any pretext whatsoever." The trial court refused to declare a vote illegal when a voter admitted going into the voting booth twice and casting two votes! (See Point II of Petition).

Flaunting the rules of evidence and the Petitioner's constitutional right to witnesses, the trial court refused to allow the Petitioner to depose her hand-writing expert (who is well respected in federal and state courts) preventing her from proving that six signatures on absentee ballots and other voting credentials were not genuine. (See Issue III of Petition).

The Petitioner trailed the winner by six votes. However, she did not, in fact, lose the election. *N.J.S.A.* 19:29-1(e) provides that elections can be contested when "legal votes are rejected" in a number "sufficient to change the result" of the election. The Respondent Superintendent of Elections admitted that eight votes had not been tabulated by the voting machines -- two votes more than the number sufficient to have the election declared invalid according to the statute. Instead the trial judge ruled that these votes were of no consequence

because (based on the Superintendent's past experiences) these voters either "fled" the booths without voting or were "confused" and failed to register their votes. (See Point II of Petition).

This type of judicial abuse is typical of trial courts today and is particularly onerous when winning or losing an election often hinges upon a single vote. Not a year goes by without the New Jersey courts being faced with election contest actions wherein they must decide on whether certain votes were legally cast and whether the election itself was conducted according to the legislative procedures designed to insure the integrity of the electoral process. This problem is exacerbated when the Attorney General refuses to instruct his Boards of Election to supervise elections according to state statutes. Furthermore, voter's rights to have their votes counted, will continue to be denied by a judicial system which does not follow the laws.

It should be noted by this court, that the New Jersey appellate system is also part of the problem. With increasing frequency these courts refuse to come to a decision until the time is passed for a new election -- thus eliminating and making moot the need for an new election or a runoff.

In Respondent's letter brief, the Attorney General reasoned that this petition should be denied because "the issues raised are factually limited to the 1995 election" and "are unlikely to recur" [sic] and no remedy is available for the alleged improprieties."

The Petitioner is shocked by the Attorney General's reasoning. The office of the Attorney General is charged with overseeing the election process. The guidelines for running elections come directly from his office. His legislative mandate is to insure the integrity of the electoral process.

Respondent cites *Lewis v. Continental Bank Corp.*, 494 *U.S.* 474 (1990) for the premise that the instant case is moot. However, in that case, the Florida laws which prevented the plaintiff out-of-state holding company from owning an in-state bank, were rendered moot by federal legislation, i.e. 1987 BHCA amendments. In the instant case, the injurious laws are still in full force and are being challenged not as they are written but as to how they are being unconstitutionally applied.

In summary, the Petitioner admits that the time has passed wherein Petitioner could serve on the Englewood Cliffs council by being granted a new election. However the time has not passed wherein this Court can remedy the election practices which promote voter fraud and slovenly supervision of the elections which allow votes to magically disappear under an articulated cloak of "voter confusion" or "failure to register."

POINT III THIS PETITION PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE.

In his letter brief the Attorney General expressly states an opinion that this Petition "presents no question of general public importance." The Petitioner passionately disagrees. The right to vote and the right to have that vote counted for its full worth are fundamental rights upon which our country is founded. *U.S. v. Mosley*, 383 *U.S.* 904 (1915). Furthermore, this Court, in the past, has ruled that the right to vote is a federally protected right which cannot be taken from a voter through dilution or a failure to count that vote. *Griffin v. Burns*, 570 *F.2d* 1065 (1st Cir. 1978).

Petitioner suggests that the Attorney General's opinion that voters' right are of no great public importance, is a Freudian slip of egregious and significant magnitude -- it betrays the lack of importance the Attorney General gives to insuring that the integrity of elections. This is a denial of the importance of and a rejection of his very job description. Under the Governor of the State, he is the head of executive functions of government. All Boards of Elections are under his directives and supervision.

POINT IV IN REACHING THE DECISIONS BELOW, THE COURTS DID NOT USE "ADEQUATE AND INDEPENDENT" STATE LAW BUT USED LAWS ENACTED TO PROTECT THE RIGHTS TO VOTE IN STATE AND FEDERAL ELECTIONS, THUS GIVING THIS COURT JURISDICTION.

In the letter brief, Respondent states that the issues herein were disposed of by the New Jersey court on "the basis of "adequate and independent" state laws and therefore are not subject to Supreme Court review, citing *Zucchini v. Scripps-Howard Broadcasting Co.*, 433 *U.S.* 562 (1977). Petitioner argues that this is not true. The laws used to deny the Petitioner a remedy for her injuries were not unconstitutional on their face, but unconstitutional as applied. Furthermore, Petitioner is arguing that while the state has the right to regulate the election process, it does not have the right to regulate it in such a way that voters are disenfranchised by a failure to count their votes or by diluting them.

The Attorney General states that the decisions below were grounded in "adequate and independent" state laws but this statement is inaccurate and misleading. The Petitioner is

appealing from the highest court in the state and that court denied to reach the merits of the constitutional issues clearly raised, giving this Court §1257 jurisdiction. Furthermore, the prior decisions of the trial court and appellate court rested on state statutes which were grounded in the Constitutional concept of protecting the citizens' right to vote in both state and federal elections, including those challenged herein as unconstitutionally applied.

It is submitted to this Court that if the laws enacted by the State of New Jersey continue to be unconstitutionally applied in such a manner as to deny the concept of "one person, one vote," the Petitioner, as well as others, will continued to be disenfranchised by the electoral process maintained by the Respondent Board and Superintendent of Elections, which in turn, is governed by an Attorney General who is of the opinion that the protection of right to vote is not of "great public importance."

CONCLUSION

For all of the aforementioned reasons, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

DIANE SANK, *Pro Se* Date: July 7, 1999

APPENDIX A

State Seal
THE STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
124 HALSY STREET
PO BOX 45029
NEWARK NEW JERSEY 07101
FAX NO. (973) 648-3879

CHRISTINE TODD WHITMAN
Governor

John J. Farmer, Jr.
Attorney General

TEL. (973) 648-3879

June 23, 1999

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street
Washington, D.C. 20543

Re: I/M/O of the Application of Diane Sank to Contest the Election of Ilan Plawker to the Office of Councilperson of the Borough of Englewood Cliffs
Docket No. 98-1995

Dear Mr. Suter:

Respondents, the Bergen County Superintendent of Elections and the Bergen County Board of Elections, waive their right to file a brief in opposition to the petition for a writ of certiorari in the above entitle matter. We wish, however, to

offer the following limited comments to underscore the absence of the requisite grounds for granting certiorari.

Most critically, respondents must emphasize that the validity of the 1995 election for council in Englewood Cliffs at issue herein is now moot. On January 1, 1999, Ilan Plawker competed the term of office that is contested in this matter. In contrast to Morse v. Republican Party of Virgo, 517 U.S. 186, 235 fn. 48 (1996), which involved ongoing Republican party policies, the issues raised in this petition are factually limited to the 1995 election, are unlikely to recur and no remedy is available for the alleged improprieties in the election process. Because the petition presents no question of general public importance and it is unlikely that the identical factual issues will arise in the future, review by the Court at this juncture is not warranted, Lewis v. Continental Bank Corp., 494 U.S. 472 (1990).

Additionally, the factual issues raised by the petitioner -- that there were more voting authorities issued than voters registered, that the handwriting experts testimony was excluded and that the ballots of voters maintaing [sic] more than one residence were counted -- were decided by the state courts on the basis of independent state laws and therefore this case does not qualify for Supreme Court review. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). Similiarly, [sic] petitioner's challenge of Mrs. Messinger's alleged second vote was properly denied review by the state appellate court on state law grounds because it was not presented to the trial court and did not concern the jurisdiction of the trial court or concern a matter of great public interest.

In sum, the Appellate Division decision in this case is a well-reasoned application of settled principles of state law applied to the specific facts of the case and does not present a conflict among judicial decisions conflict among judicial

decisions that requires review by the Supreme Court. Moreover, since the term of the council seat sought by petitioner has expired, review by this Court is not warranted. It is respectfully submitted that the petition for certification should be denied.

Respectfully submitted

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents
Bergen County Superintendent
of Elections and the Bergen County
Board of Elections

By: /s/ Andrea M. Silkowitz
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cc: Diane Sank
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APPENDIX B

November 15, 1984

The Record Newspaper

Section B3

VOTE TIED IN RACE FOR CLIFFS COUNCIL SEAT

ENGLEWOOD CLIFFS-- The official count of absentee ballots has turned a close borough council race into a dead heat, election officials announced yesterday.

Absentee ballots were tallied incorrectly after the November 6 election said county Election Commissioner Chairman Nick Castronuovo.

In the official count, Democratic incumbent Lee Langbaum closed in on Republican challenger Diane Sank. Castronuovo said each woman received 1,529 votes in tallying completed Friday. Prior to that, their unofficial totals were Sank, 1,538, and Langbaum, 1,513.

The chairman said the two candidates have the option to ask for a recount, but neither had done so. He said the deadline for requesting the recount is Nov. 25.

Langbaum said yesterday she was still undecided what course she would take, and Sank had no comment. Langbaum, however, said she felt as if she had been given a reprieve.

"It was a tremendous disappointment, because I love serving this town." she said. "But now I feel as if I've been given a second chance."

If no recount is requested, a special election will be held within 50 days to fill the seat, said Deputy County Clerk Joan Lesemann.

Lesemann said last night that she had not yet been able to get a definitive answer because the circumstances were unusual, but she believes a special election would be paid for by the county. She is not sure of the cost of such an election.

Castronuovo said over 23,000 absentee ballots countywide were cast this Election Day, the highest in at least five years.

APPENDIX C

November 15, 1984

The Record Newspaper

Section B3

GOP CANDIDATE WINS BY 1 VOTE

By Kathleen Lynn
Staff Writer

LEONIA -- Republican Stefan Bucek, who apparently was unsuccessful in his bid for a one-year borough council term, actually had won by a single vote, according to the official tally announced yesterday by the Bergen County clerk's office.

But because the election was so close, Democrats and Republicans have asked the Bergen County Board of Elections to recount the votes cast Nov. 6.

The county clerk's election division reported that winners of three-year seats were Democratic incumbent Marion Freidson, with 2,118 votes, and Republican Evelyn "Lynne" Berenbroick with 2,080. Democratic incumbent Bert Kohl received 2,079 votes, and Republican Mary Kollar, 2045.

Winners of the race for two one-year terms were Democrat Concezio "Connie" Petrella, with 2,105 votes, and Republican Bucek, 2,064. Incumbent Democrat Manos Lampidis received 2,063 votes and Republicans Stanley Astanian, 2,541.

The board of elections has scheduled a recount for Tuesday.

Berenbroick said that Democrats and Republicans had agreed to split the election board's recount fee, expected to total $225.

Democrats now hold all six council seats and the mayor's post. If the recount confirms the county clerk's tally, two Republicans–Berenbroick and Bucek--will take seats in January.

APPENDIX D

November 22, 1989

The Record Newspaper

Section B3

ELECTION RESULTS STAND AFTER RECOUNTS

By Mary Jo Layton and Corky Slemaszko
Record Staff Writer

Election recounts in nine towns in Bergen and Morris counties confirmed the Nov. 7 results and put to rest legal challenges from losing candidates.

In Bergen County, the election results remained the same in Bogota, Paramus, Wood-Ridge, Northvale, and Ramsey after recounts Tuesday afternoon, officials said.

In Englewood Cliffs, Republican Committeewoman Arlene Wiczyk picked up three absentee ballots and narrowed her loss to Democrat Roberta Stern to one vote, said Eileen Feldner, chairwoman of the Board of Elections.

Neither Wiczyk nor Stern could be reached for comment Tuesday.

Three recounts in Morris County offered no hope for challengers in Morristown, Chatham Township and especially in Montville—where one vote swayed the race.

Committeeman David Marshall, who challenged fellow Republican Mayor Fred Eckhardt after falling one vote short in a bid for the second open committee seat, lost again by one vote.

"I'm disappointed," Marshall said Tuesday. "But I'm relieved that it's over. I don't know if I'll run again. We'll cross that bridge when we come to it."

Lillian Harberson, assistant to the superintendent of elections in Morris County, said no challenges had been made on the recounts and all of them were finished by noon Tuesday.

In Passaic County, Democratic freeholder candidate Cyril Yannarelli, who lost by some 1,800 votes, will have until Nov 28 for a recount, according to Bianca Hancock, Secretary to the Board of Elections.

APPENDIX E

June 7, 1997

The Record Newspaper

Section B1

CLIFFS' GOP WILL BREAK TIE IN PRIMARY PROCESS FAVORS PARTY INSIDER

By DOUG MOST
Staff Writer

ENGLEWOOD CLIFFS— A tie in Tuesday's Republican primary between Diane Sank and Councilman Ramon Ferro has left the decision of who advances to the November election in the hands of the borough GOP Committee.

Who heads the nine-person committee? Ferro's close friend and supporter, Angelo Mungioli. Who did the committee endorse in the election? Ferro and his running mate, Councilman James Bancroft, who won in the primary.

Ferro and Bancroft also are members of the committee, but Mungioli said they have been disqualified from voting.

"It just didn't seem fair to have them vote," Mungioli said.

Mungioli has called for the committee to meet Sunday to vote. Either Sank or Ferro will then join Bancroft in the race against Democrats Jerry Kasoff and Joseph Cioffi for two, three-year terms. The vote could be delayed or called off if Sank or Ferro asks for a recount, and it changes the result.

A number of borough officials said that, right or wrong, the tie-breaking process seems to favor incumbents. State statute says deadlocks in primaries are broken by party committees, unlike ties in general elections, which are broken by runoffs.

"It's not a proper way," Sank said Wednesday after learning of the state statute. "The people voted. If its a tie, the people should be given an opportunity to have their voice heard again. It shouldn't be decided by a partisan committee.

"When you have an election that's a tie, in a regular election you have a runoff," Sank said. "The same should apply here."

Sank said she had not decided whether to seek a recount.

Asked whether the process clearly favors Ferro, Mungioli said, "In a small town like this, I don't think it favors anyone. Both have a good shot."

"I guess we'll see what happens," Ferro said. "It is strange, that's for sure."

Bancroft drew 153 votes Tuesday, Ferro and Sank got 150 apiece, and Sank's runningmate, Peter Chen, collected 130.

APPENDIX F

March 2, 1999

The Record Newspaper

Section L3

MUM'S THE WORD ON ALPINE VOTE FLAP

WITNESSES SCARCE FOR MAYORALTY TRIAL

By RICHARD COWEN
Staff Writer

Allegations of voter fraud in the November mayoral election may be the talk of the town in Alpine these days, but that doesn't mean folks are willing to talk about it in a court of law.

Lawrence Manus' bid to regain the mayoral seat he lost by one vote five months ago to Paul H. Tomasko has hit a snag. Manus' legal team has been having trouble serving subpoenas on voters who are witnesses in the case—many of whom Manus contends cast absentee ballots.

It's a problem that has plagued Tomasko, who also is challenging some of the absentee ballots cast for Manus.

The problem with getting witnesses to come forward forced Superior Court Judge Peter T. Murphy to postpone the trial on Monday for the third time—but not before he warned both sides he was beginning to lose his patience.

"Your case is not the only case I have," Murphy said. "I've got a lot of other things to do than to sit down and wade through the discovery process."

Murphy scheduled another hearing for Thursday, when he will set a new trial date, expected to be in April.

At issue are about 50 absentee ballots cast in the election, which Tomasko won 349 - 348. Of those absentee ballots, about 20 are being challenged by either side on the grounds that they contain forged signatures, or were cast by voters who were not Alpine residents.

Manus' attorney, John Schepisi, said he as been trying to serve subpoenas on several voters living outside Alpine—some of them as far away as Washington, D.C. Tomasko said that it is not unusual for Alpine residents to maintain several addresses.

But because subpoenas have to be served in person to be legally binding, getting the trial preliminaries completed has proved to be a problem.

Schepisi said Alpine residents don't want to get involved and haven't been answering the door when his legal team tries to subpoena them. In one instance, Schepisi dispatched his secretary to deliver a bouquet of flowers to an Alpine resident. When the resident opened her door, she found a subpoena tucked inside.

"They're hiding," Schepisi said. Manus could not be reached for comment on Monday. Schepisi however, predicted victory.

"When all the evidence is in, I believe the judge will set aside the election result," he said.

The Borough of 1,900 residents is one of the wealthiest towns in America, with median family income of more than $150,000, according to the 1990 census—more that three times higher than Bergen County.

Tomasko said he has spent $10,000 of his own money defending himself.

The two men are fighting for a job that is part-time and pays nothing.

Tomasko, who took office as mayor in January, disagrees, but he has been taking heat form residents that he has had to subpoena.

"It's unfortunate, but by virtue of one man's desire to hang on to political office, we have to become part of this disgusting game," Tomasko said.